Office - Supreme Court, U.S.
FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2396

In the Supreme Court of the United States

OCTOBER TERM, 1982

MAURICE BENJAMIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Jones v. *Barnes*, cert. granted, No. 81-1794 (June 7, 1982) 4

United States v. *Aulet*, 618 F. 2d 182 3

United States v. *Lovasco*, 431 U.S. 783 3

United States v. *Lurz*, 666 F. 2d 69 3

United States v. *Schreiber*, 599 F. 2d 534, cert. denied, 444 U.S. 843 3

United States v. *Sturm*, 671 F. 2d 749 3

Statutes:

18 U.S.C. 371 1

18 U.S.C. 1014 1

18 U.S.C. 1341 1

18 U.S.C. 1343 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2396

MAURICE BENJAMIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's only contention in this Court is that he was denied effective assistance of appellate counsel because his attorney failed to consult him in preparing the brief filed in the court of appeals.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy, four counts of mail and wire fraud, and three counts of making fraudulent statements in bank records, in violation of 18 U.S.C. 371, 1014, 1341, and 1343. He was sentenced to six years' imprisonment and $29,000 in fines. The court of appeals affirmed all but the bank fraud convictions, reducing petitioner's fine to $14,000.[1]

---

[1]Petitioner's five co-defendants were convicted of conspiracy and a number of substantive offenses. With one exception, their convictions were affirmed on appeal; the court reversed the bank fraud convictions of one of petitioner's co-defendants.

1. The evidence showed that petitioner and his co-conspirators defrauded a number of individuals and a financial institution, using a fictitious bank ostensibly located in St. Vincent, West Indies. The "bank" was founded by one of petitioner's co-conspirators. It had neither assets nor tellers and performed no financial services (Tr. 212). Two employees answered telephones and responded to inquiries. When necessary, they also verified the legitimacy of the bank's certified checks and other financial instruments (Tr. 342-343). The conspirators printed an advertisement in a banking directory and distributed copies of the advertisement, which claimed bank assets in excess of $250 million. The advertisement was used to lure and convince intended victims (Tr. 348, 613, 647). Some of the conspirators duped businessmen in need of financial assistance by arranging "loans" for them from the fictitious bank for an advance fee payment, generally about 10% of the face amount of the loan. Others, including petitioner (Pet. App. 12-14), cashed worthless checks drawn on the bank or used the checks to pay unwitting merchants for various goods or services.

2. After petitioner's conviction, he was taken to the Medical Center for Federal Prisoners in Springfield, Missouri, to serve the remainder of a sentence on a prior federal conviction. A few days before this case was argued in the court of appeals, but several months after his attorney had filed a brief on his behalf, petitioner sent two mailgrams to the court of appeals. In one of the mailgrams, petitioner indicated that he took "exception to some of the items in [the] brief," and requested postponement of the argument (Pet. App. 22). In the other, which apparently was a copy of a mailgram to his attorney, petitioner stated that he believed there were (Pet. App. 20) "many more items in the appeal, for instance the conspiracy charge, the individual counts charging me with illegal acts that were legal, the mistake in the printing, its language, and now being drugged systematically during the entire trial."

3. Petitioner's ineffective assistance of counsel claim should not be considered in this Court for the first time. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). Moreover, petitioner's claim is predicated in large measure on unresolved factual assertions, such as that petitioner was not consulted in the preparation of the brief (see Pet. App. 20).[2] The courts of appeals generally refuse to consider effective assistance of trial counsel claims raised for the first time on appeal for similar reasons. See, *e.g.*, *United States* v. *Sturm*, 671 F. 2d 749, 750-751 (3d Cir. 1982); *United States* v. *Lurz*, 666 F. 2d 69, 78 (4th Cir. 1981); *United States* v. *Aulet*, 618 F. 2d 182, 185-186 (2d Cir. 1980); *United States* v. *Schreiber*, 599 F. 2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979). "Such claims typically require * * * consider[ation] [of] allegations and evidence that are outside of the trial record." *United States* v. *Sturm*, *supra*, 671 F. 2d at 750-751; see *United States* v. *Lurz*, *supra*, 666 F. 2d at 78. Therefore, in the first instance, such claims should be raised in the district courts by motion pursuant to 28 U.S.C. 2255, permitting development of the necessary record and resolution of any contested factual issues.

---

[2]Petitioner suggests that the court of appeals abused its discretion and contributed to the denial of his right to effective appellate counsel by denying his request for postponement of oral argument. The court's denial of petitioner's request was well within its discretion. First, petitioner's request for postponement was made just a few days before the argument. Second, the reason given for the requested postponement was the vague statement that petitioner took "exception to some of the items in th[e] brief" filed on his behalf. (Pet. App.22). The explanation offered for the belated assertion of these "exceptions" was that petitioner had not seen the brief "because" he had been incarcerated. *Ibid.* Without more, the court of appeals reasonably refused this last minute request for delay in a case scheduled for argument with the appeals of five other defendants. In any event, the significance of the denial of postponement depends on whether petitioner in fact consulted with his attorney in preparing the appeal or whether he had been unable to do so for some reason beyond his control, for which his attorney or the government was to blame.

There is no reason to hold this case pending disposition of *Jones* v. *Barnes*, cert. granted, No. 81-1794 (June 7, 1982). The question presented in that case is whether appellate counsel's failure to raise each of the non-frivolous arguments suggested by his client constituted ineffective assistance of counsel. Petitioner does not assert and, on the record in this case, it cannot be determined whether petitioner requested his attorney, before the appeal brief was filed, to raise any of the claims that he now suggests (Pet. 7-8) should have been raised on appeal. Even if there were an affirmance in *Jones* v. *Barnes*, therefore, this case would require additional factual development before it could be ascertained whether petitioner might benefit from such a result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1982

DOJ-1982-08